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STATUTE

Los Angeles Municipal Code, Sec. 47.50, Subsec. (h) 1, 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 805

LURA D. GLASSEY,

Petitioner,

vs.

C. B. HORRALL, Chief of Police of the City of Los Angeles.

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Statement of the Case.

The facts in this case are quite simple. Petitioner was not charged with being a Nudist, or with practicing Nudism. She was charged with conducting a camp in violation of subsection (h) of Section 47.50 of the Los Angeles Municipal Code, regulating the conduct of nudist camps.

Subsection (h) of Section 47.50 of the Los Angeles Municipal Code (sometimes hereafter referred to as Section 47.50 only) [R. p. 9, fol. 14] declares it to be unlawful to *operate, manage* or *conduct* a camp, or other place of resort,

> "wherein three or more *persons not all of the same sex* are permitted or allowed to commingle in the

nude; or wherein *persons are permitted or allowed to view persons of the opposite sex in the nude.*" (Emphasis ours.)

The petitioner was charged with operating, etc., a camp, etc., wherein three or more persons not all of the same sex were permitted and allowed to commingle in the nude. [R. p. 10, fol. 15—Complaint.]

Assuming for the sake of argument that one who believes in the tenets of Nudism might have cause to complain were he entirely deprived of the right to practice his beliefs, it does not follow as a matter of fact or of law that a person who conducts such a camp is a believer in or follower of such social concepts.

Questions of Law Involved.

The petitioner states the first question of law presented to be whether subsection (h) of Section 47.50 *"which prevents the operation of any place where Nudism may be practiced,"* as applied to the petitioner, unconstitutionally restricts the petitioner's personal liberty. (Petition p. 2—emphasis added.)

To state the matter charitably, petitioner's allegation, emphasized above, that the ordinance prevents the operation of any place where Nudism may be practiced, is a misrepresentation of both the terms of the subsection and of the effect thereof. The only thing prohibited by the subsection is the conduct of a camp in which (1) a commingling of the sexes is permitted, or (2) in which persons of the opposite sex are permitted to view each other in the nude. Because of the fact that petitioner was charged only with doing the act designated as (1) above [R. p. 10, fol. 15—Complaint], we shall confine our discussion to such portion of the subsection.

The subsection involved does not prohibit the conduct of camps in which the sexes are prevented from commingling while in the nude and nude persons are not viewed by persons of the opposite sex. It does not prevent the conduct of camps in which persons of the opposite sex may commingle at times when they are not in the nude.

Properly stated, question of law number one is:

Is a subsection of an ordinance which does not prohibit the practice of Nudism, but does prohibit the conduct of camps where persons of the opposite sex commingle in the nude, unconstitutional by reason of restricting the liberty of persons conducting camps in a manner prohibited by the ordinance provision involved?

Petitioner states her second question as follows:

> "Does the practice of Nudism pursuant to a sincere belief in the principles of Nudism where there is no showing of obscene or immoral conduct constitute an exercise of freedom of speech, within the guarantee of the Due Process clause of the 14th Amendment?"

In view of the fact that the subsection here involved does not prohibit the practice of Nudism, but at most constitutes only a *regulation* of such practice, it would appear, for reasons more fully set out in the Argument herein, that this question is not presented by the record before the court.

It is not improper, however, to point out at this time that, instead of prohibiting the practice of Nudism, Section 47.50 specifically provides for the licensing of camps in which such cultism may be practiced, subject to certain regulations concerning the method of conducting such camps. [R. p. 8, fol. 13.]

SUMMARY OF THE ARGUMENT.

I.

THE RECORD DOES NOT PRESENT A CASE WHICH, UNDER THE PRACTICE OF THE COURT, REQUIRES A DECISION UPON THE FEDERAL QUESTION.

II.

THE ORDINANCE DOES NOT UNDULY RESTRICT THE PRACTICE OF NUDISM.

III.

THE PROHIBITION OF ACTS WHICH ARE OFFENSIVE TO MORAL CONCEPTS IS WITHIN THE POLICE POWER OF THE STATE, AND SUCH PROHIBITION DOES NOT OFFEND AMENDMENTS ONE OR FOURTEEN OF THE FEDERAL CONSTITUTION.

IV.

RELATION OF THE "CLEAR AND PRESENT DANGER DOCTRINE" TO THE ORDINANCE DISCUSSED.

V.

THE ORDINANCE IS NOT ARBITRARY, VAGUE, INDEFINITE OR UNCERTAIN.

VI.

CONCLUSION.

ARGUMENT.

I.

The Record Does Not Present a Case Which, Under the Practice of the Court, Requires a Decision Upon the Federal Question.

The court in *The Rescue Army v. The Municipal Court of the City of Los Angeles,* ..... U. S. ..... (91 L. Ed. Adv. Sheets 1221), has again emphasized the fact that, although jurisdiction be shown, it is the policy of the court to refrain from deciding a federal question unless it appears from examination of the record that the question is squarely presented.

It does not appear that the petitioner was or is a person who is a believer in Nudism, or that she ever has practiced Nudism. She was charged with and convicted of conducting a camp where persons of the opposite sex appeared in the nude. [R. p. 10, fol. 15—Complaint.] Assuming for the purpose of argument only that no one other than bona fide converts to the Nudist cult were allowed to enter the camp, it does not follow as a matter of law or fact that the person who is engaged in running such camp was herself a believer in the tenets of Nudism.

No person may require a court to decide the validity of a law unless it appears that the law infringes in some manner upon his own rights or liberties.

Hanneford v. Silas Mason Co., 300 U. S. 577, 583;

Virginian Ry. System v. System Federation No. 40, 300 U. S. 515, 558;

Utah Power & L. Co. v. Pfost, 286 U. S. 165, 186;

Massachusetts v. Mellon, 262 U. S. 447, 488.

Assuming that a believer in the tenets of Nudism, who is prevented by law from practicing his belief, has the right to ask this court to pass upon the validity of such a law, it does not follow that a person who, so far as the record is concerned, was operating a camp because of the profit or remuneration obtained thereby, and who, so far as the record is concerned, is not a worshipper at the Shrine of Nudism, has a right to ask this court to protect his property rights because the ordinance involved may infringe upon the personal liberties of converts to such cultism. It does not appear that there are not other camps reasonably situated in which those who are sincere believers in such cultism may practice the teachings of Nudism subject only to reasonable regulations concerning the manner of conducting such camps.

II.

The Ordinance Does Not Unduly Restrict the Practice of Nudism.

We do not set ourselves up as experts upon the subject of Nudism as a social belief. If we be correct in our understanding, the practice of exposing one's body to the sun and elements was originally conceived as a health measure, and was practiced for that purpose only. We have been informed that subsequently there was inculcated into the *credo* of the sect an additional doctrine, that the association of the sexes in the nude tends to promote sexual purity in the community. Just what is the underlying theory we confess our inability to comprehend, unless

it be the old adage that "familiarity breeds contempt" and therefore association in the nude tends to decrease the desire or temptation to indulge in lustful acts.

We find it unnecessary to determine whether such belief is or is not a part of the creed in as much as it appears from the statement of the principles and standards set out in Exhibit I of petitioner's petition to the Supreme Court of California that the association of opposite sexes in the nude is not a necessary incident to consummation of the objects sought to be attained. [R. p. 6, fol. 10.]

We also note in petitioner's argument in support of her petition that she sets forth the alleged beliefs of the cult of Nudism in five separate sentences. (Petition p. 8.) We respectfully submit that fulfillment of each of such beliefs which, according to petitioner, comprise the creed or tenets of the social belief called Nudism, may be fully and completely realized and enjoyed without the association of the opposite sexes while in a nude condition.

It therefore follows that a subsection of an ordinance which prohibits the conduct of camps where persons of the opposite sex commingle in the nude does not deny any member of the cult the right to practice Nudism according to the tenets of his social creed.

III.

The Prohibition of Acts Which Are Offensive to Moral Concepts Is Within the Police Power of the State, and Such Prohibition Does Not Offend Amendments One or Fourteen of the Federal Constitution.

The position of petitioner appears to be that a social concept, whatever its nature, comes within the protection of the First Amendment, and the indulgence in or practice of such social concept is entitled to the same protection afforded by such Amendment to the practice of religion. We do not understand petitioner to urge that Nudism is practiced as a means of worship of some Supreme Being. To say that her theory is at least novel is an understatement.

It has been often said that for the purpose of determining the meaning and application of a statute the court would attempt to ascertain what the legislature intended to accomplish by a given statute. Likewise it is proper to consider what our forebears intended to protect by the First Amendment. In the instant case, in as much as no question of free speech is involved, we may confine our inquiries to what object was sought to be accomplished by the provision for freedom of worship.

However limited may be the right of courts to take judicial notice of facts, certainly this court can take judicial notice of the fact that at the time of the colonization of America there was an established English church and that certain colonies were established as a refuge from conformance to such State religion. Likewise the court can take notice of the fact that nations other than England had State religions and that persons not conforming to

such religions were persecuted. Many of the original colonists came to the new continent to enjoy "religious freedom" but, sad to say, too often their idea was not religious freedom, but freedom to worship in their own manner and to compel others to conform to their form of worship. This backdrop reflects the light upon the First Amendment so that we can see that the citizens of the new nation intended that there could never be a State religion which would prevent them from worshipping God in such manner as they saw fit. It was never intended that the First Amendment protect the practice of social ideologies which offended public morals or decency. However strong our imagination may be, we find it impossible to imagine that our forefathers, who would have been shocked at the sight of a woman in a modern evening gown, to say nothing of one on the streets in bra and shorts or on the beach in a modern bathing suit, ever intended the First Amendment to be used as a shield behind which to carry on Nudism.

This court has held that laws which prohibited plurality of wives were valid, even as to those who practiced such custom as a religious duty or belief.

> *Reynolds v. United States,* 98 U. S. 145;
> *Davis v. Beason,* 133 U. S. 333;
> *Church of Jesus Christ of Latter Day Saints v. United States,* 245 U. S. 366.

Certainly the power to enact prohibitive measures aimed at protecting the public morals is no less with respect to social ideologies than it is with respect to religion.

That the protection of public morals is a function within the police power of the state is so well settled as to need no citation of authorities in support thereof.

IV.

Relation of the "Clear and Present Danger Doctrine" to the Ordinance Discussed.

Petitioner urges that the practice of Nudism itself, without more, does not constitute a clear and present danger to society. (Petition p. 10.) We have found no cases in which courts have attempted to apply such doctrine to ordinances aimed at the protection of public morals and decency.

In view of the fact that during argument of the *Rescue Army* and *Gospel Army* cases a member of this court indicated that it could not be seen wherein the clear and present danger doctrine was applicable to these cases, we are inclined to think that such doctrine has no application to the instant case. For that reason it is with some considerable hesitancy that we risk trespassing upon the time of the court by discussing the point. However, because of prevalent uncertainty in the minds of the judiciary as well as in the minds of the legal fraternity concerning the scope of the doctrine, we feel impelled to discuss the subject briefly.

The question which arises is: What constitutes a clear and present danger?

Using a physical illustration, we will suppose that a number of children were playing on the street and a dog affected with rabies appeared on the street two blocks away. Was there a clear and present danger that some of the children might be attacked by the dog? Or would the possibility that some alert citizen might kill the dog before it reached the children defeat the clear and present danger doctrine until the dog got within a few feet of them? Or would the fortuitous possibility that such dog

might turn aside or pass the children in its path, thus doing them no harm, impel the conclusion that there was no clear and present danger until and unless the dog was in the act of biting a person?

Applying the same reasoning to freedom of speech and press as it may apply to national safety, and considering the fact that the writer of this brief several years ago sat at the counsel table when opposing counsel, representing a certain alleged party which we here leave unnamed, said in argument to the court that such political party intended to overthrow the government of the United States, peacefully if possible, by force of arms if necessary, we wonder whether the doctrine ceases to be operative when the legislature, from facts before it, has reasonable grounds to believe that, unless certain action is taken, jeopardy to the peace of the State will result, or must it wait to act until violence occurs and the streets run red with blood?

We confess our inability to understand from petitioner's brief wherein or how she feels that the doctrine applies to ordinances aimed at preserving morality and decency. Admittedly the clear and present danger doctrine was originally conceived as a yardstick (if really intended as a yardstick, see concurring opinion of Mr. Justice Frankfurter in *Pennekamp v. Florida*, 328 U. S. 331) for the measure of statutes which, under the guise of protecting the security of the nation, might unduly circumscribe the exercise of certain rights guaranteed by the federal Constitution. Just where, in the opinion of the petitioner, does the clear and present danger doctrine become a controlling factor with respect to the ability of the states to legislate with respect to morals and decency? Does it

permit the enactment of ordinances regulating the practice of Nudism when and if it appears that fornication and inhibited sexual practices are indulged in, or must the state wait until such time as by reason of sexual conduct the state becomes burdened with the support of children begotten of such sexual excesses?

The answer does not lie in the statement that in the camp conducted by the petitioner no improper acts are permitted or indulged in, any more than it could be urged by the proprietor of a drug store that, because the druggist properly conducted his drug store, laws against the sale of adulterated drugs are void as to him, or for the manufacturer of food products to say that because he never prepares adulterated foods, laws which prohibited adulteration are invalid.

Regulatory laws are for the prevention of evil before it occurs, and punishment for violation thereof is prescribed as a means of prevention and not for punishment for the sake of punishment.

It is presumed that legislative bodies, when adopting measures under the police power have possession of facts which justify their action (*South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 191), and in line with such rule it must be assumed that the facts before the City Council justified the conclusion that conduct of nudist camps in the City of Los Angeles, in which persons of the opposite sex were allowed to commingle, resulted in conditions detrimental to public morals and welfare.

V.

The Ordinance Is Not Arbitrary, Vague, Indefinite or Uncertain.

Petitioner urges (Petition p. 15) that the ordinance is void because of the failure to define the word "nude." Such word is defined in all standard dictionaries, and is a word meaning of which is commonly understood.

The requirements of reasonable certainty do not preclude the use of ordinary terms to express ideas which find adequate interpretation in common use and understanding.

> *Sproules v. Binford,* 286 U. S. 374, 393, and numerous cases therein cited.

The Appellate Department of the Superior Court found that the ordinance was not void by reason of uncertainty. In this connection we note our inability to find in the printed record, or in petitioner's petition, a copy of the decision of the Appellate Department. It has always been our understanding that petitioner must either point in his petition to where this court may find a challenged decision published, or include a copy of such decision in his papers. This the petitioner has failed to do. However, in order that this court may not be under the necessity of speculating as to what the State court decided in the case, we attach hereto as Exhibit A, a copy of such decision.

VI.

Conclusion.

That this ordinance was enacted in its entirety for the purpose of protecting public morals and decency cannot well be denied. That the State cannot regulate the beliefs of citizens with respect to subjects political or religious is now well established, and, at least for the purpose of the instant case, we may assume that the same doctrine applies to social beliefs. It is just as well established that the State may circumscribe the methods of practicing such beliefs.

No one who has viewed the modern form of dress, and in particular the abbreviated costumes worn at our bathing beaches, can well deny that since the days of the foundation of the Republic major changes with respect to what is decent and indecent has occurred in the minds of the general public. Even so, we think it is within the power of a legislative body, acting under the police power, to require that, when persons of opposite sexes commingle in camps, they be clothed in something less revealing than a smile and a cloak of innocence, and that they wear at least the equivalent of the fig leaf with which Adam and Eve are said to have clothed themselves in the Garden of Eden.

We submit that the petition for certiorari should be denied.

Respectfully submitted,

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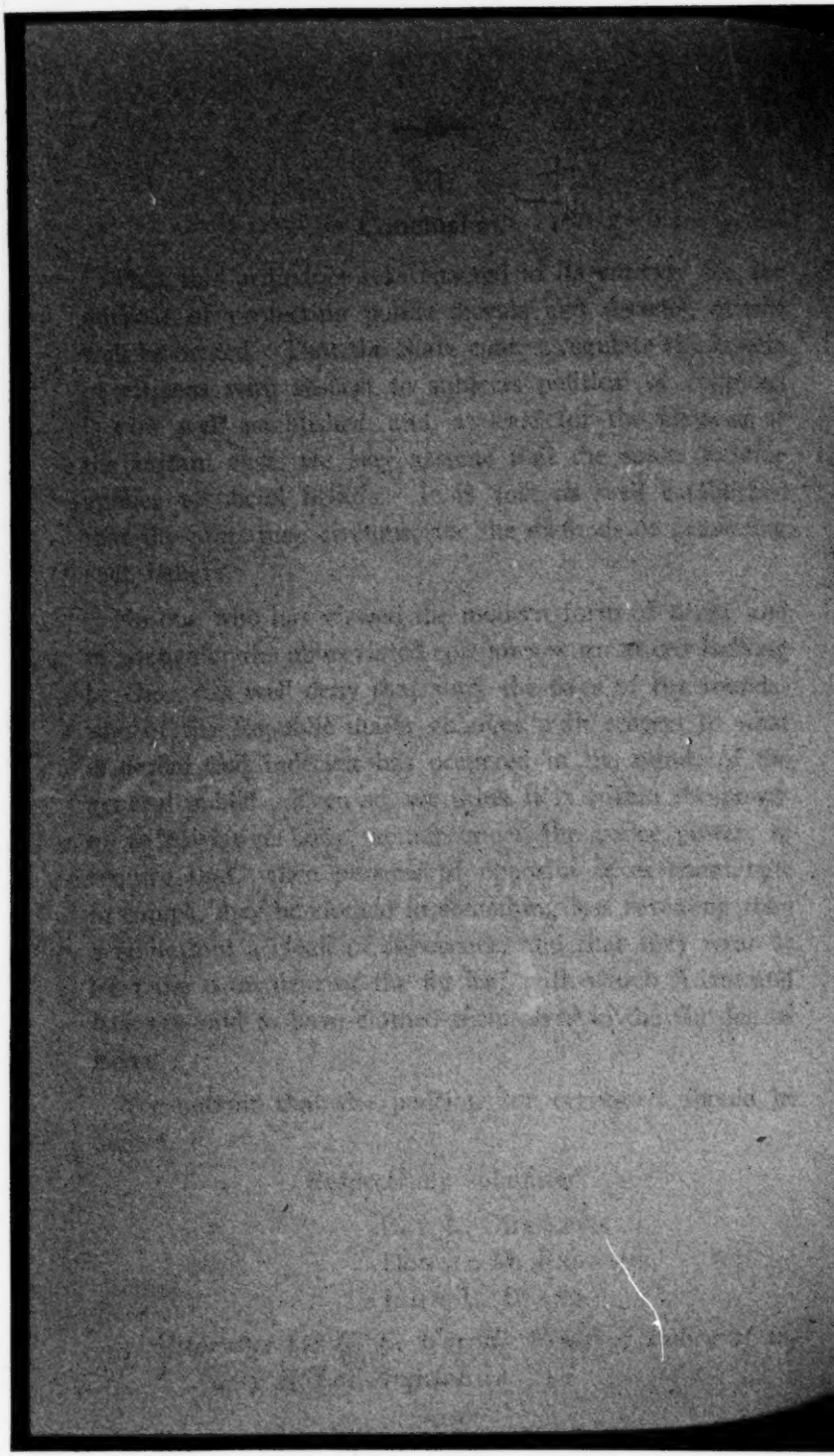

EXHIBIT A.

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

People of the State of California, Plaintiff and Appellant, vs. Lura D. Glassey, *et al.*, Defendants and Respondents. No. CR A 2256.

MEMORANDUM OPINION.

Appeal by plaintiff from an order made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Affirmed.

The charge upon which defendants were convicted is laid under subdivision (b) of Section 47.50 of the Los Angeles Municipal Code. This subdivision is not dependent upon any of the other provisions of Sec. 47.50 for its meaning or effect, but is entirely severable from them. Appellants' several arguments assuming either that other parts of the section are to be read into subdivision (h), or that the complaint charges a violation of such other parts are therefore passed without further discussion.

We do not find subdivision (h) to be invalid either for uncertainty or as unduly restricting personal liberty. Neither does it conflict with Sec. 311, subd. 1 of the Penal Code. That section deals only with the conduct of a person who exposes himself, while the prohibition under consideration affects only those who provide a place where that may be done.

The evidence that defendants operated the place is not legally insufficient to support the verdict in that respect.

While it may have been unnecessary for the court, in its instructions, to mention to the jury the parts of Sec. 47.50 other than subd. (h), the court clearly informed them that the defendants were not charged with violation of these parts of the section and then gave them the purport of subd. (h) under which the charge was laid. We find no prejudicial error in the giving or refusal of instructions.

SHAW, *Presiding Judge.*

We concur.

BISHOP, *Judge.*

STEPHENS, *Judge.*